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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Respondent,

v.

AKIKO TAKIZAWA,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HENRY B. ROTHBLATT
Attorney for Petitioner
232 West End Avenue
New York, New York 10023
(212) 787-7001

(10831)

QUESTIONS PRESENTED

1. Whether the Fifth Amendment permits the government in a criminal prosecution to introduce non-impeaching evidence on its direct case that the defendant, who was being advised by counsel, invoked her Fifth Amendment privilege at an I.R.S. criminal division conference.

2. Whether the simple fact that a document is used during cross-examination of a prosecution witness proves that defense counsel intended to introduce it into evidence in his case in chief for purposes of F.R. Crim. P., Rule 16(b)(1)(A).

3. Whether sanctions imposed on a criminal defendant for allegedly violating reciprocal discovery rules are limited by the demands of the Fifth and Sixth Amendments.

4. Whether the conduct of a trial judge, which convinces a jury that the defendant is guilty, violated the defendant's right to a fair trial.

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Petitioner Akiko Takizawa respectfully requests that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Second Circuit entered in this case on December 3, 1980 and January 21, 1981.

OPINION BELOW AND JURIDICTION

Akiko Takizawa was indicted for and found guilty after trial of evading income taxes and lying to immigration authorities. Judgment of conviction was entered by United States District Judge Whitman Knapp in the Southern District of New York on July 30, 1980. The Second Circuit Court of Appeals affirmed Ms. Takizawa's conviction by summary order dated December 3, 1980, and denied her petition for rehearing by order dated January 21, 1981. Copies of both orders of the Court of Appeals are set forth in the Appendix. The Court has jurisdiction of this matter under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Relevant portions of the Fifth and Sixth Amendments to the United States Constitution, 26 U.S.C. § 7201, 18 U.S.C. § 1001, 18 U.S.C. § 1546, and Federal Rules of Criminal Procedure, Rules 16 and 14, are set forth in the Appendix.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

A grand jury in the Southern District of New York returned an indictment against Akiko Takizawa on March 10, 1980. The indictment charged Ms. Takizawa with evading her income tax obligations for 1973 and 1974 in violation of 26 U.S.C. § 7201, with concealing information from I.R.S. in violation of 18 U.S.C. § 1001, and with making a false statement to immigration authorities in violation of 18 U.S.C. § 1546.

The case was assigned to District Judge Whitman Knapp.

On May 23, 1980, Ms. Takizawa filed a suppression motion. Ms. Takizawa claimed that a recently revealed tape-recorded conversation between her and a government informant, Rosita Mendoza,

was not consensual, but was the product of government coercion. Ms. Takizawa noted that Rosita was a call girl from Venezuela who was in an unusually vulnerable position, and that Rosita had told Ms. Takizawa she had been threatened and harassed by I.R.S. and I.N.S. agents.

On the same date, Ms. Takizawa asked that the immigration count be severed from the tax counts for trial since there was a likelihood of prejudice from their joinder. Ms. Takizawa noted that the similarity of the offenses, coupled with the different defenses they required, called for their severance.

On June 2, 1980, the opening day of trial, Judge Knapp denied both motions.

He found that Rosita was not forced to tape record her conversations with Ms. Takizawa and, therefore, he would not suppress the tapes. He also found that the tax and immigration counts were properly joined.

The government's direct case lasted three days. At the end of its case, Judge Knapp dismissed the concealment count of the indictment since the government had not shown any "trick, scheme or devise" that amounted to a violation of 18 U.S.C. § 1001. Ms. Takizawa then testified on her own behalf, and the government presented a single rebuttal witness.

The tax evasion counts and the immigration count were given to the jury, and, on June 9, 1980, the jury found that Ms. Takizawa had done the acts required to be guilty of both offenses.

Although the jury never returned a "guilty" verdict, Judge Knapp equated its factual findings with a guilty verdict and set sentencing for July 30, 1980.

On June 25, 1980, two weeks after the conclusion of Ms. Takizawa's trial, Judge Knapp convened a conference to discuss the possibility of Ms. Takizawa's obtaining a new trial. Judge Knapp had explicitly ordered Ms. Takizawa to be present.

Without any prior warning or justification, Judge Knapp unilaterally accused Ms. Takizawa's trial attorney, Henry B. Rothblatt, of incompetence, and he accused both lawyer and client of collaborating to put in a "patently fraudulent defense".

Judge Knapp then told Ms. Takizawa to consult with another attorney,

Mr. James Dempsey, to consider moving for a new trial because of her lawyer's ineffectiveness.

Ms. Takizawa did as she was told but, after consulting with Mr. Dempsey, decided she wanted to keep Henry Rothblatt as her lawyer.

Accordingly, Mr. Rothblatt filed Ms. Takizawa's post-trial motions on her behalf. He specifically charged Judge Knapp with bias toward him and his client and asked Judge Knapp to recuse himself. He also asked Judge Knapp to set aside the verdict because Ms. Takizawa was deprived of a fair trial by the judge's conduct.

Judge Knapp denied these motions, but, in an extensive dialogue with defense counsel, retracted his "patently fraudulent defense" allegation and reaffirmed his incompetence allegation, explaining that he

disagreed with Mr. Rothblatt's tactics and disliked counsel's "arrogant ineptitude". Judge Knapp then sentenced Ms. Takizawa to two concurrent five year terms, with three months to be spent in confinement, and fines totalling $22,000.

On August 6, 1980, one day after Ms. Takizawa filed her notice of appeal, she moved to reargue her recusal motion because defense counsel found new evidence explaining Judge Knapp's irrational and continued animosity toward Mr. Rothblatt. Judge Knapp denied this motion on September 22, 1980.

By order dated December 3, 1980, the Second Circuit Court of Appeals affirmed Ms. Takizawa's conviction, and on January 21, 1981,

denied her petition for rehearing. On January 5, 1981, the Second Circuit had denied Ms. Takizawa's request for a stay of mandate pending her petition for a writ of certiorari. On January 27, 1981, Justice Marshall also denied Ms. Takizawa's application for a stay.

Ms. Takizawa is currently at liberty on the government's agreement to adjourn her surrender date.

STATEMENT OF FACTS

Akiko Takizawa is a thirty-three old artist who was born and raised in Japan. After graduating from Shin Shu University in 1970 with a degree in psychology and a license to teach retarded children, Ms. Takizawa came to the United States to pursue her interest in art. Since her arrival here, she has studied at some of New York City's most famous art schools. In addition, she has studied graphic design, children's literature and, to help her in her studies and social situations, conversational English. Ms. Takizawa has produced literally hundreds of paintings over the past decade.

During the latter part of 1973, Ms. Takizawa became involved in the call girl profession to help finance her art career. In 1973 and 1974, she took the

money she received from seeing men and put it into her bank accounts. A number of her clients paid by check, and she also deposited these checks in her bank accounts.

Ms. Takizawa did not file any income tax returns for these years, nor did she pay any taxes on the income she received. The government computed Ms. Takizawa's tax liability of approximately $3,000 for 1973 and $6,000 for 1974.

In December of 1975, Revenue Agent Hans Seidemann of I.R.S. sent Ms. Takizawa a letter inquiring about her failure to file any tax returns for 1973 and 1974. Ms. Takizawa, unaware of the legal implications of her not filing her tax returns, took

the letter to her lawyer, Thomas Moringiello[1], to seek his advice.

Attorney Moringiello had helped Ms. Takizawa several times before on immigration matters. For example, he helped her obtain a student visa, and he was in the process of arranging for her to obtain permanent resident status.

Ms. Takizawa showed Moringiello the letter from I.R.S. and explained her situation to him. He told Ms. Takizawa that she was a student and that students do not have to pay taxes. He also told her that she should not pay off I.R.S. to stop its harassment of her because,

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1/ Thomas Moringiello has, since the date of Ms. Takizawa's trial, been disbarred and indicted in New York State for defrauding his clients out of hundreds of thousands of dollars.

if she admitted the nature of her extra-curricular activities, her admission would open her up to harassment by any government agency that could use her profession as leverage. He noted that if she bought off I.R.S. by paying taxes she did not have to pay, the government would "chase her forever in the profession."

To avoid problems, Moringiello told Ms. Takizawa to close all her bank accounts. He also had his associate, David Ratner, prepare a letter to I.R.S. that explained Ms. Takizawa was a student being supported by her parents and that she did not have to pay taxes. Mr. Ratner sent the letter to one of the many addresses listed on the I.R.S. letter, and he

sent a copy to Ms. Takizawa. Agent Seidemann, the intended recipient, testified that he never received the letter. A copy of this letter, later marked Defense Exhibit B, is set forth in the Appendix.

Ms. Takizawa, accompanied by Moringiello, promptly closed her bank accounts as she was told.

Over the next year and a half, the I.R.S. investigated what has been characterized as the "lucrative East Side prostitution business." For whatever reason, the investigiation came to focus on Ms. Takizawa, and a large number of call girls were called by the I.R.S. to provide information about Ms. Takizawa. Once there, the call girls were told Ms. Takizawa was the target, and a great deal of resentment built

up against her because of the harassment all the "girls" were suffering.

One of the most resentful "girls" was Rosita Mendoza. Rosita had received a I.R.S. summons in Ms. Takizawa's name, and Ms. Takizawa had told Rosita that I.R.S. was investigating Rosita and several other girls as well, so that she would not bear the brunt of all the anger building against her.

In November of 1976, Rosita called Ms. Takizawa and lied about the nasty tactics I.R.S. and I.N.S. were using against her. Ms. Takizawa compassionately tried to comfort Rosita by telling her to trust her lawyer and by repeating Moringiello's advice to

fight the illegal activities in which the government was engaging. Ms. Takizawa did not know her friend was setting her up for I.R.S.. The government would later use Ms. Takizawa's contorted legal advice to Rosita to prove her intent to evade her 1973 and 1974 taxes, and would use the uncorroborated testimony of Rosita to establish that Ms. Takizawa received "kickbacks" and made "$3,000 a week" in 1976.

In May of 1977, approximately a year and a half after Moringiello's associate had sent his letter to Agent Seidemann, Ms. Takizawa was called down to a conference with the I.R.S. special agents who were then lookong into possible criminal violations of tax laws. Ms. Takizawa had heard nothing further from I.R.S. until this point.

Moringiello arranged to have a Japanese interpreter present to assist Ms. Takizawa, and Moringiello himself accompanied Ms. Takizawa to the conference.

Ms. Takizawa was advised of her constitutional rights by one of the special agents. One of the rights she was explicitly given was her right to remain silent if she felt an answer might incriminate her. The agents then interrogated Ms. Takizawa about her financial situation. In the course of the interrogation, Ms. Takizawa consulted frequently with Moringiello who answered many of the questions for Ms. Takizawa or directed her to answer in line with the letter he had sent to I.R.S. in 1975. On several occasions during the interview, Moringiello either invoked the

Fifth Amendment for Ms. Takizawa or advised Ms. Takizawa not to answer certain questions that may have implicated her in other criminal matters stemming from her involvement in the call girl profession.

Ms. Takizawa heard nothing further from I.R.S. until Moringiello told her that the case had been dropped. This was, in fact, totally wrong since the matter had been referred to the United States Attorney's office for prosecution. Thus, she was shocked when she was arrested in early 1980 and told she was being charged with income tax evasion. She thought Moringiello had taken care of everything and that the matter had been settled.

Meanwhile, in 1979, Ms. Takizawa applied for permanent resident status. Moringiello prepared the appropriate form and Ms. Takizawa signed it. Several months later, Ms. Takizawa appeared at the office of I.N.S. examiner Jack Rubin for a formal interview. After engaging in some small talk, Rubin went through Ms. Takizawa's written application. When he finished, he asked Ms. Takizawa to swear to the answers she had given on the application. Ms. Takizawa did so, unaware that her "no" answer to Question 19 -- had she ever engaged in "commercialized sexual activity" -- was not considered truthful.

THE TRIAL -- TAX EVASION

To establish its tax evasion case against Ms. Takizawa, the government had to prove that Ms. Takizawa had taxable income and that she intentionally failed to pay taxes she knew she had to pay. Ms. Takizawa conceded that she did, in fact, have taxable income in 1973 and 1974, but that she did not pay any taxes on her income. Nevertheless, the government put on a parade of witnesses who testified that they had paid money for sex, and several government witnesses who testified that Ms. Takizawa's bank accounts showed she received income during 1973 and 1974, that she did not file tax returns, and that she did not pay any taxes.

On the issue of Ms. Takizawa's intent to evade paying taxes, the government tried to establish that the receipt of "Form-1099"'s from her banks alerted her to her obligation to pay taxes in 1973 and 1974, that Ms. Takizawa did not respond to Agent Seidemann's 1975 inquiry about her tax returns, that Ms. Takizawa stopped her activities for a time during 1976 because of the I.R.S. investigation, that Ms. Takizawa's conversation with Rosita Mendoza showed her knowledge of her tax obligations, and that the answers she and Moringiello gave at the 1977 interview were untrue. The government also tried to establish that during the I.R.S. investigation, in 1976 and 1977 Ms. Takizawa told

clients to make checks out to "cash" because of the I.R.S., and that Ms. Takizawa and her lawyer's properly invoking her Fifth Amendment privilege at the I.R.S. meeting in 1977 showed her "understanding" of the proceedings.

THE TRIAL - IMMIGRATION

To establish its perjury case against Ms. Takizawa, the government had to prove that Ms. Takizawa knowingly made a false statement under oath. To prove her knowledge, the government looked to the testimony of I.N.S. Examiner Jack Rubin who said he asked Ms. Takizawa whether she was ever a prostitute.

THE TRIAL - DEFENSE

Ms. Takizawa took the stand on her own behalf and testified that she relied entirely on her attorney, Thomas Moringiello, in her tax and immigration matters.

She stated that when she took Agent Seidemann's letter to him, he told her she did not have to pay taxes and that he would take care of the tax authorities. He then sent a letter, Defense Exhibit B, to Agent Seidemann.

Ms. Takizawa also stated that Moringiello kept assuring her everything was fine, and he instructed to do what he told her to do to avoid future problems with I.R.S.. Ms. Takizawa introduced several corroborative letters into evidence.

Similarly, Ms. Takizawa pointed out that Moringiello prepared her immigration

application, and she signed it without reading it. The form itself indicates Moringiello was the preparer, and the complexity of the form, with its lengthy sections of small type, makes Ms. Takizawa's statement that she did not read it perfectly credible.

Ms. Takizawa remembered her interview with I.N.S. Examiner Rubin. She did not remember Mr. Rubin asking her about "prostitution" or "commercialized sexual activity". She merely remembered some small talk and a cursory review of her application. Mr. Rubin made no claim to remember his interview with Ms. Takizawa.

Thus, the question the jury was to determine was whether Ms. Takizawa was telling the truth when she said that she relied on

Moringiello and did not know she had to pay taxes or was being untruthful on her immigration application.

FIFTH AMENDMENT

During the government's direct case, Judge Knapp permitted the prosecutor, Carolyn Henneman, to question Special Agent Contrastano about Ms. Takizawa's invoking her Fifth Amendment privilege at the May, 1977 I.R.S. meeting.

Although the agents conducting the interview had explicitly told Ms. Takizawa and her attorney that she was free to refuse to answer any questions they asked her, and although the evidence is crystal clear that Ms. Takizawa, if she spoke at all, specifically invoked her Fifth Amendment rights on the contemporaneous advice of her lawyer, the prosecutor argued that Ms. Takizawa's invoking her Fifth Amendment rights showed her "understanding" of the proceedings. Mr. Rothblatt argued that

allowing the jury to know Ms. Takizawa invoked her Fifth Amendment rights was prejudicial and not probative of her "understanding" since it was obvious that her lawyer was telling her to invoke these rights.

Judge Knapp bought the prosecutor's argument and, after telling the jury why he was admitting it, allowed the prosecutor to elicit testimony from Agent Contrastano about the questions to which Ms. Takizawa responded by asserting her constitutional right not to answer.

The argument, ruling, instructions to the jury, and examination of Agent Contrastano are set forth in full in the Appendix.

RECIPROCAL DISCOVERY

During the government's direct case, I.R.S. Revenue Agent Hans Seidemann testified primarily about the investigative and computational steps he took to determine Ms. Takizawa's tax liability for 1973 and 1974. During his testimony, however, he said that he had sent a letter to Ms. Takizawa asking about her tax returns for those years, and he received no response to this letter or a follow-up letter he sent the next week.

On cross-examination, Mr. Rothblatt had Defense Exhibit B marked for identification. Defense Exhibit B was a xerox copy of a letter that Ms. Takizawa obtained from the files of her former attorney, Thomas Moringiello. This letter was addressed to Agent Seidemann at the I.R.S. office in Brooklyn,

New York, and was signed by David Ratner, an associate of Moringiello. A copy of Defense Exhibit B is set forth in the Appendix.

As soon as Exhibit B was marked, the prosectuor objected to any use of the letter because she had made a demand for reciprocal discovery and the letter had not been turned over.

Mr. Rothblatt, prefacing his remarks with "I am not precise" and "I would guess", mistakenly explained that he had received Moringiello's files only a few weeks before. Nevertheless, Judge Knapp decided that even if Mr. Rothblatt had received it two weeks earlier, he had plenty of time to turn it over to the prosecutor. Judge Knapp

ordered the letter excluded on the prosecutor's motion.[2]

2/ During the discussion about the letter, Judge Knapp said to the prosecutor: "I am not sure the government is wise in excluding the letter because it is obviously a fraud." After the trial, Judge Knapp explained that he meant the letter was "full of lies" since Ms. Takizawa was not being supported by her parents, and in that sense a fraud. However, the prosecutor apparently misunderstood Judge Knapp's meaning of "fraud" and jumped to the conclusion that Mr. Rothblatt and Ms. Takizawa were trying to perpertrate a fraud on the jury. Defense counsel, on the other hand, knew the letter, written by Ms. Takizawa's former lawyer, contained inaccurate statements. While it would not contradict Ms. Takizawa's "reliance on counsel" defense , the letter was not useful for any purpose except to rebut the single unfavorable inference the jury would draw from Agent Seidemann's testimony, that Ms. Takizawa ignored his strong hint that she had better start paying her taxes.

Later, during Ms. Takizawa's direct examination, Mr. Rothblatt asked her to describe what happened after she received Agent Seidemann's letter. After she explained that she went to her lawyer for advice, and recounted the advice she was given, Mr. Rothblatt asked if she received any communications from her lawyer. When she could not recall, Mr. Rothblatt showed her Exhibit B to refresh her recollection. After Ms. Takizawa reviewed Exhibit B, she testified that she did receive a copy of a letter shortly after her meeting with Moringiello, and she testified briefly to its contents.

In the meantime, the prosecutor vigorously objected to Mr. Rothblatt's using the letter "in any fashion." Judge Knapp properly ruled that Mr. Rothblatt was entitled to refresh Ms. Takizawa's

recollection with the letter, despite the prosecutor's objections.

Several minutes later, Mr. Rothblatt produced a copy of a letter, Defense Exhibit C, that Moringiello had sent directly to Ms. Takizawa.[3] After Ms. Takizawa noted that she had received correspondence from Moringiello, Mr. Rothblatt refreshed her recollection with Exhibit C. Again the prosecutor objected, and again Judge Knapp ruled that Mr. Rothblatt's conduct was perfectly proper.

Suddenly, without warning, Judge Knapp started to interrogate Mr. Rothblatt, in front of the jury, about

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3/ Defense Exhibits C-I were letters that defense counsel deemed protected by the attorney-client privilege, and hence not discoverable. They figure only peripherally in the question before the Court.

why he did not turn over the letters to the government, although Mr. Rothblatt had not sought to introduce them into evidence. Then, just as inexplicably, he told Mr. Rothblatt to put the letters into evidence, and he would explain to the jury what consideration they could give to Mr. Rothblatt's "violating the rules". Mr. Rothblatt, now on the spot before the jury, expressed himself to be "delighted" to put them in so the jury would have "all the facts".

The prosecutor, on voir dire, questioned Ms. Takizawa about the lack of envelope creases in Exhibit B, although it was clearly represented to be a file copy of a letter sent to I.R.S.. Then, with no evidence whatsoever to support her charge, the prosecutor stated to the

jury: "I submit it is a fabrication".[4]

Mr. Rothblatt introduced several other letters and, each time, Judge Knapp told the jury they were being introduced in violation of the rules and that the jury would have everything explained later.

At the end of Ms. Takizawa's direct testimony, Judge Knapp twice offered the government a continuance to allow it to investigate its specious charges of

4/ During the voir dire, Ms. Takizawa accurately reported she had obtained a copy of her file from Moringiello several months, not several weeks, before her trial. Although Mr. Rothblatt had innocently mistaken when his office received the file, Judge Knapp jumped to the conclusion that Mr. Rothblatt had intentionally lied to him. Despite Mr. Rothblatt's repeated attempts to explain his mistakes, Judge Knapp repeatedly called Mr. Rothblatt a "liar", threatened him with prosecution under 18 U.S.C. § 1001, and utterly refused to listen to anything he had to say about his alleged discovery violation.

fabrication. The prosecutor refused both offers, and instead chose to start her cross-examination immediately.

Subsequently, at the pre-charge conference, Judge Knapp decided that he would not bother to instruct the jury about the legal significance of Mr. Rothblatt's failure to turn over the letters he found to have been discoverable because "it would take too long. I would have to explain they shouldn't hold it against the defendant personally and all that kind of nonsense". Instead, Judge Knapp told the prosecutor that in summation: "You can make any argument you want to and he can't reply and that's the ruling and -- that I find just under the circumstances."

The prosecutor accepted Judge Knapp's offer and argued extensively that Exhibit B was a fabrication, created by Ms. Takizawa and Mr. Rothblatt to defraud the jury, or else it would have been turned over before trial. The prosecutor repeated her charge once again in her reply.

JUDICIAL MISCONDUCT

Throughout the proceedings in the District Court, Judge Knapp made his personal hostility toward defense counsel perfectly clear. Before trial, Judge Knapp ridiculed counsel's legal arguments. During trial, he lost no opportunity to attack defense counsel and to undermine his case. After trial, he openly accused defense counsel of incompetence and fraud, to the delight of the news media which could not resist reporting Judge Knapp's personally and professionally devastating attacks on a highly respected and reknowned trial attorney.

While Judge Knapp's most flagrant abuses took place outside of the jury's presence, they do give a clear picture of the seething hostility

that underlay the entire trial and that was undoubtedly communicated to the jury in less direct ways. For example, when Judge Knapp stopped Mr. Rothblatt from cross-examining a witness, Mr. Rothblatt asked for a sidebar. This was denied. Later, after the jury left, Mr. Rothblatt tried to make his record. Judge Knapp, however, engaged in a pointless display of indignant anger that Mr. Rothblatt would question his "infallible" ruling. Even later, when Judge Knapp discovered that Mr. Rothblatt had been mistaken about when his office received Moringiello's files from Ms. Takizawa, he went into several rages, calling Mr. Rothblatt a "liar" and "incompetent", threatening him with prosecution, and questioning his personal and professional ethics.

Judge Knapp then went out of his way to ignore Mr. Rothblatt's explanations and apologies for his mistake, preferring, instead, to continue to deride him and to punish him for his conduct of the trial. As the section discussing the discovery matters makes clear, Judge Knapp made sure that the jury would draw the inference that Mr. Rothblatt was a fraud and punish him by convicting his client.

Judge Knapp admitted after trial that he did not think Mr. Rothblatt's defense to be the best. Thus, when he had a chance to sink the defense, he did it to prove his opinion was correct. For example, Judge Knapp's decision to allow the prosecutor to introduce evidence that Ms. Takizawa invoked her Fifth

Amendments rights was based on his contemptuous disregard for her defense that she did exactly as her lawyer told her.

Throughout the trial, Ms. Henneman was treated with professional courtesy, and Mr. Rothblatt was treated with contempt. The difference in treatment could not be lost on the jury. For example, Judge Knapp had little patience for Mr. Rothblatt's objections. Even when he made perfectly proper objections, Judge Knapp would haughtily tell him to "stop interrupting", "sit down", "stop talking" or "stop making speeches". Pointedly, Judge Knapp addressed very few such comments to the prosecutor, his former law clerk, although she made many improper objections and posed several improper questions. Indeed, near the end of the trial, Judge Knapp explicitly

anointed Ms. Henneman the winner of a courtroom personality contest, although he was simultaneously cautioning the jury not to consider the personalties of counsel.

Judge Knapp not only gave unwarranted credibility to the prosecution case, but he rode close rein on the defendant's case. For example, although Mr. Rothblatt had stipulated to vast areas of the prosecution's case and reduced a potentially complex case to a few simple issues, Judge Knapp halted or severely curtailed his cross-examination of several prosecution witnesses. One witness was expressing uncertainty of her memory of the one key piece of testimony she had given. At that point, Judge Knapp stopped Mr. Rothblatt's cross-examination and

dismissed the witness. Another, Rosita Mendoza, was being questioned about her interest in seeing Ms. Takizawa convicted, her bias against Ms. Takizawa, and her admitted lies to Ms. Takizawa. Judge Knapp stopped all inquiry into these critical areas. Later, Judge Knapp refused to admit portions of the taped conversation Rosita had with Ms. Takizawa about trusting her lawyer because the government did not want them admitted.

In contrast to his restrictive handling of the defense case, he allowed the prosecutor to roam wherever she wanted. For example, he allowed Ms. Henneman to question a Japanese carpenter about Japanese income tax laws, allowed the government broad access to Ms. Takizawa's personal papers pursuant to a subpoena duces tecum, allowed Ms.

Henneman to cross-examine accusingly Ms. Takizawa about a threat made against Rosita by another call girl, allowed the prosecutor to inquire whether Mr. Rothblatt had asked the defendant on direct examination whether she had ever been threatened by Rosita, and allowed Ms. Henneman to argue that Exhibit B was "fabricated" without any evidence to support her charge.

DECISION BELOW

By order dated December 3, 1980, the Second Circuit Court of Appeals summarily affirmed Ms. Takizawa's conviction. The court noted in its order that Judge Knapp did not err in handling the alleged discovery violation, that the government's use of Ms. Takizawa's Fifth Amendment privilege was proper to "rebut" her contention that she did not "understand" the proceedings, and that Ms. Takizawa's other contentions are "without merit". A A copy of the order is set forth in the Appendix.

ARGUMENT

I. THE GOVERNMENT'S USE AT TRIAL OF EVIDENCE THAT DEFENDANT, WHO WAS ADVISED BY COUNSEL, INVOKED HER FIFTH AMENDMENT RIGHTS AT AN IRS CRIMINAL INVESTIGATION IS

This Court has consistently held that the government cannot impermissibly burden the exercise of Fifth Amendment rights by making it "costly" to do so. Griffin v. State of California, 380 U.S. 609 (1965); Carter v. Kentucky. No. 80-5060 (Decided March 9, 1981); see also, Berger, Taking the Fifth, at 193-220 (1980).

In Griffin and Carter, this Court held that a defendant cannot be penalized if he chooses not to testify at trial. Thus, it is constitutional error for the prosecutor or trial court to comment on defendant's failure to testify, or for the trial court to

refuse a defendant's request for an instruction to the jury that it is to draw no adverse inferences from the defendant's decision not to testify.

The same considerations that forbid the court or prosecutor to point to a defendant's failure to testify as evidence of the defendant's guilt also forbid them to point to a defendant's invoking her Fifth Amendment rights before trial as evidence of guilt. As Carter noted, the very use of the privilege at trial is fraught with danger, because lay jurors often equate use of the privilege with guilt. Indeed, it is a commonplace notion that only criminals use the Fifth Amendment privilege at all since honest people have no reason to hide anything. Thus, unless there is a valid reason for the

government to introduce or call attention to such evidence, its use is invariably harmful to the defendant.

This Court had addressed the issue of when a defendant's pre-trial silence can be validly used against him. In Raffel v. United States, 271 U.S. 494 (1926), this Court allowed the prosecutor to cross-examine a defendnat about his failure to testify at his first trial. The rationale for the decision was that a defendant who testifies waives his Fifth Amendment privilege to the extent that he can be impeached by evidence of his prior conduct that is inconsistent with his present testimony.

In Doyle v. Ohio, 426 U.S. 610 (1976), this Court trimmed back Raffel's impeachment rule. Now, evidence that a defendant was silent

after being given his Miranda warnings cannot be used on cross-examination to impeach a defendant at trial. The dissent disagreed with the idea that Miranda warnings automatically make otherwise probative evidence improper. However, the dissent specifically noted that evidence that a suspect explicitly invoked his Fifth Amendment right not to talk would reduce the probative and impeachment value of silence, and the dissent reaffirmed the distinction in Raffel between using silence as evidence of guilt and using it to impeach a testifying defendant during cross-examination. Thus, both the majority and dissent in Doyle would preclude the government's using the defendant's silence, expressly grounded in the Fifth Amendment, as

direct evidence of a defendant's guilt.

Subsequently, in Jenkins v. Anderson, ____U.S.____, 65 LEd.2d 86, 100 S. Ct. (1980), this Court held that Doyle does not extend to impeachment by silence before Miranda warnings are given. In Jenkins, the defendant testified that he killed his victim in self-defense, but waited two weeks before reporting it. On cross-examination, the prosecutor questioned the defendant about this lengthy delay. This Court held such impeachment use of the defendant's silence to be proper.

Under Doyle, the prosecutor's use of evidence that Ms. Takizawa invoked her Fifth Amendment rights at an IRS criminal conference was improper. The government did not use the evidence for

impeachment, but rather on its direct case to help establish Ms. Takizawa's intent to evade taxes. Also, it is clear that Ms. Takizawa invoked her privilege after having been given her Miranda warning by the IRS agents. The evidence was not used to impeach Ms. Takizawa since she never made any claim inconsistent with her use of the privilege, her "reliance on counsel" defense was not inconsistent with her use of the privilege, and it was not probative of anything going on in Ms. Takizawa's mind since she was being actively advised by her attorney to rely specifically on the Fifth Amendment. The government's argument that her use of her privilege showed her "understanding" of the proceedings is belied by the

presence and active participation of her lawyer at the interview.[5]

5/ The Court of Appeals relied on United States v. Conlin, 551 F2d 534 (2d Cir. 1977), cert. denied 434 U.S. 831 (1977), in affirming Ms. Takizawa's conviction. In Conlin, the defendant denied being silent at the time of his arrest. The defendant put the fact of his physical silence into issue and expressly repudiated any inference that he relied on his Fifth Amendment privilege at the time. Ms. Takizawa, on the other hand, never put her silence into issue; the government did, for its own improper purposes. Thus, the Court of Appeals' reliance on Conlin is totally inapposite.

Accordingly, because the use of Ms. Takizawa's invocation of her Fifth Amendment privilege was itself improper and inherently prejudicial, the gratuitous limiting instructions given by the trial judge were worthless. Telling a jury it can draw no inferences from dangerously prejudicial evidence, except on a single issue that is itself improper, is an exercise in wishful thinking that has no place in a court of law.

The Court of Appeals' decision evidences a serious departure from the law as established by this Court in Raffel and Doyle, and this Court should correct this situation on writ of certioari.

II. USE OF A DOCUMENT ON CROSS-EXAMINATION DOES NOT ESTABLISH PRIOR INTENT TO INTRODUCE IT AS EVIDENCE IN CHIEF FOR PURPOSES OF RECIPROCAL DISCOVERY.

A defendant is not required to provide reciprocal discovery except as to discoverable material that she intends to introduce as evidence in chief at trial. Federal Rules of Criminal Procedure, Rule 16(b)(1)(A). Under Williams v. Florida, 399 U.S. 78(1970), the expressed limitation to material that will be introduced as evidence at trial saves reciprocal discovery from unconstitutionality.

Ms. Takizawa's attorney never intended to introduce Defense Exhibit B into evidence. He used it on cross-examination of a prosecution witness to rebut a single inference the jury

could draw from the witness's voluminous testimony. Clearly, the fact that a piece of evidence turns out to be useful for a defendant, because of a prosecution witness's testimony, does not transform its rebuttal use into prior intent to introduce it into evidence during the defendant's case in chief. Thus, the trial judge had no reason to charge defense counsel with violating discovery rules, and the Court of Appeals s mistaken when it noted that defense counsel's use of the letter on cross-examination demonstrated counsel's prior intent to introduce it into evidence.

Since Ms. Takizawa did not intend to introduce Defense Exhibit B into evidence, the subsequent sanctions imposed on Ms. Takizawa for her alleged violation of Rule 16 violated her Fifth

Amnedment right not to be compelled

to be a witness against herself.

III. SANCTIONS FOR AN ALLEGED RECIPROCAL DISCOVERY RULE VIOLATION BY DEFENSE COUNSEL CANNOT CONSITUTIONALLY BE PERMITTED TO INTERFERE EXCESSIVELY WITH THE MERITS OF A DEFENDANT'S CASE.

Discovery sanctions should merely have the effect of eliminating prejudice to the wronged party. See, e.g. ABA Standards for Criminal Justice, Discovery and Procedure Before Trial (Approved Draft, 1970). They should not be used as punishment, as Judge Knapp himself recognized when he rejected the government's post-trial argument that Ms. Takizawa got what she deserved because her attorney failed to turn over a copy of Defense Exhibit B.

Most cases discussing discovery violations do so in the context of defendants' arguing that the government failed to disclose material evidence

prior to trial. Thus, they are useful in gleaning general principles of rational sanctioning, although they are not directly applicable because a criminal defendant has an underlying constitutional right to a fair trial that cannot be sacrificed for minor procedural advantages to the prosecution.

The Fifth Circuit Court of Appeals, in United States v. Myers, 550 F2d at 1043, listed the factors to be considered in reviewing sanctions for a discovery violation by the government:

1. The amount of prejudice.
2. The reason for non-disclosure.
3. The extent to which harm has been mitigated by subsequent events.
4. The weight of the evidence supporting guilt.

5. The feasibility of rectifying prejudice by a continuance.

Indeed, the Second Circuit has held that when a defendant is offered a continuance, his refusal to accept it ends any claim that the withholding of information was prejudicial. United States v. Boney, 572 F2d 397, 403 (2d Cir. 1978).

The facts of Ms. Takizawa's case indicate a total perversion of all principles of rational sanctioning since the violation, if it was a violation at all, was not prejudicial to the government and it was easily rectified by the offer of a continuance or an even less intrusive sanction. Instead of entering an order that simply corrected any procedural imbalance

caused by defense counsel's use of Defense Exhibit B on cross-examination, the trial judge imposed an escalating series of sanctions that switched the focus of the trial from Ms. Takizawa's guilt of the offenses charged in the indictment to her, and her lawyer's, guilt of "violating the rules" and trying to defraud the court and jury to win an acquittal.

The trial court's initial sanction, when Exhibit B was first introduced during cross-examination of Agent Seidemann, was to exclude the non-disclosed letter. Relying on the permanence that usually attaches to such rulings, defense counsel assumed that certain other undisclosed letters, deemed protected by the

attorney-client privilege, would also not be admitted by the trial court. Accordingly, defense counsel sought to have Ms. Takizawa testify to her dealings with Moringiello without introducing the letters. Defense counsel simply showed Ms. Takizawa the letters to refresh her recollection. However, the prosecutor objected to their use for any purpose because they were not disclosed to her.

This set the stage for the next sanction. In the presence of the jury, and without defense counsel making any effort to place the letters in evidence, the trial judge, sua sponte, questioned defense counsel and told the jury that defense counsel had violated

the rules, and only then suggested that defense counsel offer the letters into evidence. Surprised by this sudden accusation that put him on the spot in front of a thoroughly-suspicious jury, defense counsel had no choice but to offer them all to show he had nothing to hide.

The prosecutor, despite the obvious hole in which the defendant now found herself because of the comments made by the court, tried to intensify the jury's unjustified suspicion by arguing that Exhibit B was a "fraud" and a "fabrication". The trial judge made no effort to ascertain whether there was,in fact, any basis for these accusations against Ms. Takizawa and and her attorney.

Later in the day, the trial court twice offered the prosecutor a continuance to investigate the letters he had already admitted into evidence. Implicitly acknowledging that such an investigation would go nowhere, and that she could score nore evidentiary points by suspicion and innuendo than by facts, she twice declined.

This set the stage for the last sanction, where the trial court for the first time used the word "sanction". After an extensive discussion of everything the prosecutor could say about the letter, and what defense counsel had better not say, the trial court specifically forbade defense counsel from arguing that, even with the resources available to it, the government could not produce any evidence to prove

that Exhibit B was fabricated or a fraud.

With this, the prosecutor lost no time arguing on summation and in her reply that Exhibit B was a fabrication and a fraud because it was not disclosed before trial. Bound by the spirit of the trial court's order, in light of the entire presummation conference, defense counsel could not argue the lack of a factual basis for these allegations. In short, this final sanction operated, on the entire record, to create an irrebuttable presumption of consciousness of guilt from the mere fact that a discovery rule was violated.

The Court of Appeals characterized the "sanction" imposed on Ms. Takizawa as a "modest" one. This Court has an opportunity to clarify when sanctions imposed on a defendant for a reciprocal discovery violation exceed those permitted by the Constitution. See Williams v. Florida, supra., footnote 14.

IV. THE TRIAL JUDGE'S MISCONDUCT DEPRIVED MS. TAKIZAWA OF A FAIR TRIAL.

Judge Knapp, because of his hostility toward Mr. Rothblatt engaged in numerous improper acts that gave the jury the impression that Ms. Takizawa was guilty. The Sixth Amendment guarantees a criminal defendant a fair and impartial trial that cannot be obtained where a trial judge openly shows his partiality to the prosecution case.

The Court of Appeals, apparently considering Ms. Takizawa's appeal to be a show down between Judge Knapp and Mr. Rothblatt, glossed over the impact of Judge Knapp's conduct on Ms. Takizawa and noted that it found

the point to be without merit.

This Court, in the exercise if its supervisory powers over the Federal courts, should address the issue of when a trial judge's conduct exceeds the bounds of judicial propriety and deprives a defendant of a fair trial. The serious deprivation suffered by Ms. Takizawa, whose rights have been lost in the conflict between Judge Knapp and Mr. Rothblatt, also requires that this Court step in to avoid a gross injustice to her.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

HENRY B. ROTHBLATT
Attorney for Petitioner
232 West End Avenue
New York, New York 10023
(212) 787-7001

March, 1981

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of December, one thousand nine hundred and eighty.

Present:
Hon. Henry J. Friendly
Hon. Walter R. Mansfield
Hon. Ellsworth A. Van Graafeiland

United States of America,

Appellee,

v.

Akiko Takizawa,

Defendant-Appellant.

O R D E R

Takizawa appeals from her conviction after a jury trial in the United States District Court for the Southern District

of New York (Knapp, J.) on two counts of income tax evasion, 26 U.S.C. § 7201, and one count of perjury in connection with her application to the Immigration and Naturalization Service (INS) for status as a permanent resident alien, 18 U.S.C. § 1546.

Appellant's principal contention is that the district court erred in precluding her counsel from referring on summation to the government's "vast investigative authority", because of counsel's failure to disclose to the Government a letter allegedly written to the Internal Revenue Service. See Fed. R. Crim. P. 16(b). Appellant argues that since she did not intend to introduce the letter in question as evidence in chief, her decision not to

disclose was proper.

In fact, defendant did use the letter in cross-examining a Government witness. The subsequent admission of the letter in evidence was not error. Neither was the modest sanction imposed. See Rule 16(d) (2).

Appellant also contends that the district court erred in allowing testimony concerning her invocation of the privilege against self-incrimination during an interview with IRS agents. The testimony was elicited for the narrow purpose of rebutting appellant's contention that she did not understand the proceedings at the interview, and the jury was so instructed. See, e.g., United States v. Conlin, 551 F.2d 534, 537 (2d. Cir.), cert. denied, 434 U.S. 831 (1977). When viewed in the light of the court's contemporaneous limiting instructions this evidence was not

prejudiciously erroneous.

We have considered appellant's remaining contentions and find them to be without merit. The judgment is affirmed.

/s/
HON. HENRY J. FRIENDLY

/s/
HON. WALTER R. MANSFIELD

/s/
HON. ELLSWORTH A. VAN GRAAFEILAND

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 21st day of January one thousand nine hundred and eighty-one.

----------x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AKIKO TAKIZAWA,

Defendant-Appellant.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Akiko Takizawa.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED. It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
A. Daniel Fusaro,
Clerk

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT-"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

SIXTH AMENDMENT-"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATUTORY PROVISIONS

TAX EVASION- 26 U.S.C. § 7201-

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

FALSE STATEMENTS- 18 U.S.C. § 1001-

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up any trick, scheme, or device a material fact,

or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

IMMIGRATION FRAUD- 18 U.S.C. § 1546-

"...whoever knowingly makes under oath...any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement-- shall be fined not more than $2,000

or imprisoned not more than
five years, or both."

FEDERAL RULES PROVISIONS

RECIPROCAL DISCOVERY-RULE 16, F.R. Crim. P.-

(a)(1)(C)- "Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(b)(1)(A)- "If the defendant requests disclosure under subdivision (a)(1)(C)

or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(d)(2)- "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit

the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

SEVERANCE- RULE 14, F.R. Crim. P.-

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for

the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

DEFENSE EXHIBIT B

December 30,1975

Mr. H. Seidemann
U.S. Treasury Department
District Director
Internal Revenue Service
35 Tillary Street
Brooklyn, New York 11201

Re: AKIKO TAKIZAWA

Dear Mr. Seidemann:

The father of the above-mentioned individual has contacted me regarding your letter to his daughter dated December 23, 1975.

Your letter inquiries regarding the 1973 and 1974 tax returns submitted by the young lady.

I have been advised that the young lady is a student and is supported by her family, therefore not necessitating an income tax return.

Please feel free to call upon me for any additional information.

The family is interested in cooperating with you to the fullest degree.

Very truly yours,

David S. Ratner

DSR:mn
cc: Ms. Akiko Takizawa

(At the side bar)

MS. HENNEMAN: On a number of occasions during the interview, Miss Takizawa, on the advice of counsel, I assume, took the Fifth Amendment and declined to answer questions.

One of the reasons I took the agent through the testimony the way I did was to avoid his testifying to that until I had a ruling from your Honor whether I could elicit that evidence.

Mr. Rothblatt has contended throughout this trial that Miss Takizawa did all these things or didn't do all these things that she is charged with because her lawyer led her down the garden path,

including the lying at this interview, and I think it is important for the government to be able to demonstrate that she realized she had an opportunity to do something other the witness answer the way he did.

The next time was when she was asked if she knew any of the women listed in Item 44, and finally when asked on the last page if she had an answering service.

THE COURT: I see.

MS. HENNEMAN: You see my predicament.

THE COURT: I think she is entitled to ask those questions in the light of your opening. I'll explain to the jury they can't draw any inferences from her answers on the issue of whether she understood the proceedings.

I'll take it.

MR. ROTHBLATT: Is your Honor ruling that Ms. Henneman has a right to ask-- if he asked those questions and she invoked her constitutional rights in response to those questions?

THE COURT: Right. I will instruct the jury that they can't draw any inferences from her using it, but the fact that she used it is relevant to her understanding of the proceedings, which is one of the issues here.

MS. HENNEMAN: I will lead, if the Court thinks that is the better way to do it, or perhaps the Court could do it.

MR. ROTHBLATT: I don't have easy answers, and I wasn't prepared for this question, but it is something

I'd like to think about, and I'm just thinking aloud: Where a client is being interviewed -- I will give you my offhand ideas -- and she is being represented by counsel, isn't it counsel's responsibility, whether he is doing a good or bad job is unimportant -- to assert and protect her constitutional rights whenever he thinks it's appropriate?

Another question is if he does that and she stands behind the protection of the advice of her lawyer in invoking the Fifth Amendment rights, can she be prejudiced at a trial because her lawyer did --

THE COURT: If her then lawyer takes the position that she didn't know what was going on she can.

MR. ROTHBLATT: Our position is that she didn't know what was going on. Our position is that she was following the advice of her lawyer.

THE COURT: You can argue that point.

MR. ROTHBLATT: That she was doing exactly what her lawyer told her to do.

THE COURT: You can cross-examine to find out whether she consulted a lawyer before she invoked her Fifth Amendment.

MR. ROTHBLATT: Asserting Fifth Amendment rights should not be indicated to a jury. It is prejudicial.

THE COURT: It normally is prejudicial, but in this particular case I think it is germane to the defense you put in and it is germane to the --

MR. ROTHBLATT: My defense is that's what happened there --

THE COURT: You can make that defense and --

MR. ROTHBLATT: I don't think we have a right to on a Sixth Amendment basis, that is, effective assistance of counsel, in asserting whatever defense she is entitled to without thereby waiving her Fifth Amendment rights.

THE COURT: I will explain it. You've got a nice point, but I'll allow it.

MS. HENNEMAN: Thank you.

Do you wish me to lead through this area?

THE COURT: I will expain to the jury.

MS. HENNEMAN: You are going to ask the questions?

THE COURT: No, you ask the questions.

(In open court)

THE COURT: Let me explain to you the sum and substance of our discussion as it will be developed in the testimony now.

On several occasions the witness at this interview declined to answer certain questions on the ground that she is privileged to do so. Ordinarily that wouldn't be admissible. The fact that she had done that would be wholly irrelevant.

However, in this particular case it is relevant on one very narrow issue, namely, your understanding of her understanding of what was going on.

You will probably hear argument on that point later on by both sides, and on that point, the way she answered and whether or not she asserted rights would have some bearing.

But I caution you that you are not to draw any inferences -- I mean, you are not to draw the inference that the answer to such a question would hurt her in any way, shape or form.

If I'm asked: Did you go to Colorado on a certain day, I can say I decline to answer on the ground of my Fifth Amendment rights, and you are not to infer that I went to Colorado, and that if I had gone to Colorado it would be for any bad purpose.

The only purpose in permitting that question is to show to what extent she understood. You may make a judgment on that issue. I'm not going to argue the point. Both sides will ultimately. I'm allowing it solely on that issue, so bear in mind if I'm asked, "Did you go to Colorado," you can't assume I went, or if I did go, I went for any bad purposes.

MS. HENNEMAN: Thank you, your Honor.

Q Agent Contrastano, during this four-hour interview, were there certain questions to which Miss Takizawa asserted her constitutional rights and declined to answer?

A Yes, there were.

Q Do you recall what the questions were that she gave that response to?

A I believe that when we asked Miss Takizawa how much money she brought in with her to the United States when she arrived she invoked her constitutional rights to the question.

We also asked her if she ever had any financial dealings with a Mr. Tomanga, and she also asserted her Fifth Amendment privilege to that question.

We asked if she knew certain individuals, we named these individuals, and she asserted her Fifth Amendment privilege to the question.

And we asked her if she ever had an answering service and

she asserted her Fifth Amendment privilege to that.

Q In connection with the names that you mentioned to her, who were those people?

MR. ROTHLBATT: I would object to that, your Honor. Those names aren't binding upon her.

THE COURT: What is that?

MR. ROTHBLATT: I would object to that question. Those names aren't binding upon her if she's declined to answer.

THE COURT: You can ask how many names there were.

BY MS. HENNEMAN:

Q Do you recall how many names?

A I think there were four or five of them. Four or five names.

Q Were they men or women?

MR. ROTHBLATT: I object to that.

MS. HENNEMAN: May I inquire of the witness whether it men or women, the names on the list?

THE COURT: Yes.

Q Was it men or women?

A They were women.

No. 80-1616

JUN 9 1981
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1980

AKIKO TAKIZAWA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

ROBERT E. LINDSAY
THOMAS M. PRESTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's invocation of her Fifth Amendment privilege at an Internal Revenue Service interview was properly admitted into evidence during the government's case at trial to show that petitioner understood the proceedings at the interview.

2. Whether the district court properly handled petitioner's deliberate violation of the reciprocal discovery rule.

3. Whether the trial judge's conduct deprived petitioner of a fair trial.

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AKIKO TAKIZAWA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals' order (Pet. App. 1a-4a) is not reported. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1980, and a petition for rehearing was denied on January 21, 1981. The petition for a writ of certiorari was filed on March 23, 1981 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of willfully attempting to evade and defeat her income taxes, in violation of 26 U.S.C. 7201, and one count of perjury in connection with her application to the Immigration and Naturalization Service for status as a

permanent resident alien, in violation of 18 U.S.C. 1546. She was sentenced to concurrent terms of five years' imprisonment on each count, all but three months of which was suspended in favor of unsupervised probation. She was also fined $22,000. The court of appeals affirmed (Pet. App. 1a-4a).

The evidence at trial showed that petitioner was a prostitute operating on the East Side of Manhattan. A number of her customers testified that they hired her in that capacity and paid her anywhere from $50 to $200 for her services. Payment was usually in cash and sometimes by checks made payable to cash. During 1973 and 1974, petitioner maintained at least five bank accounts into which she deposited a portion of her earnings from prostitution. The government employed the bank deposits method of proof to determine petitioner's gross income, and bank records alone revealed that petitioner had gross income of more than $29,000 in 1973 and more than $34,000 in 1974. Petitioner did not file income tax returns or pay taxes for either of those years.

The evidence also showed that on her written application for permanent resident status, filed with the INS in 1979, petitioner answered negatively the question whether she had ever engaged in "commercialized sexual activity." The sufficiency of the evidence to support petitioner's convictions is not disputed.

During defense counsel's opening remarks at the beginning of trial, he stated that petitioner had failed to pay her taxes because her attorney at the time had advised her not to file an income tax return and not to report her income from prostitution (Tr. 34-37A). Defense counsel further stated that the same attorney had prepared petitioner's application for permanent resident status and that she had signed the form in reliance on "the integrity and the knowledge and the professional skill of this lawyer" (Tr. 35).

In an effort to rebut the defense thus announced by counsel (and later advanced through petitioner's own testimony (Tr. 592-594)), the government presented in its case-in-chief the testimony of Internal Revenue Service Special Agent Michael Contrastrano. The agent testified that in May 1977 he and two other IRS agents interviewed petitioner. She was accompanied at the interview by a Japanese interpreter and by the attorney who allegedly had advised her not to file any tax returns (Tr. 244-245). During the interview, petitioner made numerous false statements concerning the amount and sources of her income during 1973 and 1974 (Tr. 248-258). In addition, in response to four specific questions, petitioner refused to answer and invoked her Fifth Amendment privilege against compulsory self-incrimination.[1] Because defense counsel previously had asserted that petitioner's defense would be a lack of personal understanding of her tax problems and a good-faith reliance on the advice of her attorney, the prosecutor sought to elicit testimony from Agent Contrastrano concerning petitioner's invocation of her Fifth Amendment privilege. The government offered this evidence only for what it tended to show about petitioner's comprehension of her legal affairs, not to suggest that petitioner had engaged in any wrongdoing with respect to the matters covered by the questions she refused to answer. The district court admitted the proffered testimony and gave a detailed limiting instruction explaining to the jury the narrow purpose for which the testimony was to be considered (Tr. 264-268).

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[1]The four questions that petitioner refused to answer concerned (i) the amount of money she brought with her when she came to the United States from Japan; (ii) a loan she made to another government witness in 1973; (iii) her acquaintance with four named women; and (iv) her use of a telephone answering service (Tr. 269).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 50-53), the district court properly admitted Agent Contrastrano's brief testimony regarding petitioner's invocation of her Fifth Amendment privilege at the IRS interview in May 1977.[2] The testimony was relevant for at least two reasons. First, it showed that petitioner understood the proceedings at the interview well enough to know when she wished to invoke her privilege, thereby suggesting that her comprehension of her tax obligations was not as limited as she claimed. Second, and more important, it showed that petitioner knew there was some alternative to answering the IRS agents' questions falsely. Her knowing lies during the interview regarding her income during 1973 and 1974 therefore could not have been merely the product of ignorant adherence to the advice of counsel. Petitioner knew that she was not required to answer each of the agents' questions, and yet she lied in response to several important inquiries concerning her financial affairs during 1973 and 1974. This tended to negate petitioner's good-faith defense.

A defendant's exercise of his constitutional privilege against compulsory self-incrimination is admissible against him when it is relevant to matters such as the defendant's state of mind or his understanding of proceedings in which he is involved. See, *e.g.*, *United States* v. *Trujillo*, 578 F. 2d 285, 288 (10th Cir.), cert. denied, 439 U.S. 858 (1978); *United States* v. *Two Bulls*, 577 F. 2d 63, 66 (8th Cir.), cert. denied, 439 U.S. 931 (1978); *United States* v. *Conlin*, 551 F. 2d 534, 537 (2d Cir.), cert. denied, 434 U.S. 831 (1977). Cf. *Mercado* v. *Massey*, 536 F. 2d 107 (5th Cir. 1976). Here, an unusual combination of circumstances justified the introduction of the IRS agent's disputed testimony in the

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[2]The relevant testimony occupies one page of a trial transcript that contains more than 800 pages.

government's direct case. First, defense counsel had already announced the nature of petitioner's intended defense. Second, that defense turned entirely on the extent to which petitioner had acted willfully, on the one hand, or in good faith on the advice of her attorney, on the other. Third, petitioner's mixed performance during the May 1977 IRS interview showed that she knowingly answered certain critical questions falsely, even though she knew that another non-incriminating alternative was available. This in turn tended to discredit petitioner's defense that, in failing to pay her taxes and in making a false statement on her immigration form, she acted unwittingly on the advice of counsel and therefore did not have the criminal intent necessary for conviction. If petitioner had not asserted the Fifth Amendment privilege at all, or if she had asserted it repeatedly in response to every question bearing on her tax liability, her "advice of counsel" defense arguably would have been more plausible. Her actual conduct, however, served only to confirm the government's other clear evidence of willfulness.

Review in the present case is not warranted, not only because the district court's evidentiary ruling was correct and involved a peculiar situation that does not arise frequently, but also because the government's remaining evidence was so strong and petitioner's defense so implausible. The government proved that during 1973 and 1974 petitioner earned large amounts of money that she did not report and on which she did not pay taxes. In addition, the government showed that, when directly questioned about this income by IRS agents, petitioner falsely denied its existence. Petitioner's willingness to dissemble was further demonstrated during her own testimony when she resisted characterization as a prostitute, notwithstanding the testimony of numerous government witnesses who stated that they had paid petitioner for her sexual favors (see Tr. 668-671). On direct examination, petitioner stated (Tr. 551-559) that she is a university graduate and that, in addition, she

has taken numerous college-level courses in the United States, including some at Hunter College and Columbia University. Petitioner's own summary of her educational background thus further belied her proffered defense. Under these circumstances, there is no reasonable possibility that the district court's alleged error in the admission of testimony concerning petitioner's invocation of her Fifth Amendment privilege could have affected the jury's verdict.

2. Petitioner's contention (Pet. 54-65) that the district court imposed an improper sanction for defense counsel's violation of the reciprocal discovery provision of Fed. R. Crim. P. 16 is also without merit.

One of the government's witnesses at trial was IRS Agent Hans Seidemann. Agent Seidemann testified that on December 23, 1975, he sent petitioner a letter requesting that she contact him concerning her failure to file any tax returns for 1973 and 1974. He further stated that he received no response to this letter or to a follow-up letter (Tr. 418-420).

During cross-examination, petitioner's counsel produced for the first time a copy of a letter purportedly sent by petitioner's former attorney to Agent Seidemann in response to the agent's letter of December 23, 1975 (Tr. 478). In this letter (Def. Exh. B; Pet. App. 15a), petitioner's former attorney stated that petitioner was a student supported by her parents and therefore was not required to file tax returns. This was the advice on which petitioner contended she had relied in not reporting her income and not paying taxes.

The government objected to the use of the letter on the ground that petitioner's counsel had failed to produce the letter in response to the government's timely reciprocal discovery request. The district court ruled that defense counsel had improperly withheld the letter from the government and that it therefore should be excluded from evidence

(Tr. 481). Later, however, during petitioner's direct examination, the district court admitted on petitioner's motion not only this letter but also four other letters never before shown to the government (Tr. 570-590). Subsequently, prior to closing argument, the court ruled that, as a sanction for failing to produce these materials in accordance with the reciprocal discovery provision of Rule 16, petitioner's counsel would be precluded from arguing to the jury that they could infer that the letter purportedly sent to Agent Seidemann was genuine because the government's "vast investigative authority" had not produced any evidence suggesting that the letter was a fabrication (Tr. 802-814).

Rule 16(b)(1)(A) provides that, upon request by the government and upon completion of the government's own discovery obligations, the defense must disclose and produce before trial any books, papers, documents, photographs, or tangible objects that the defendant intends to introduce as evidence in chief at the trial. Petitioner now asserts (Pet. 54-55) that her attorney never intended to introduce Defense Exhibit B (*i.e.*, the letter to Agent Seidemann) into evidence and that therefore the obligation imposed by Rule 16(b)(1)(A) was inapplicable. This blatant misstatement is conclusively refuted by the record. At trial, in response to the prosecutor's assertion that defense counsel had violated the reciprocal discovery rule, petitioner's attorney never once suggested that he did not intend to use the letter as evidence in chief at trial.[3] On the contrary, counsel stated that the letter was "essential to our defense" (Tr. 481). Counsel referred to the letter as part of petitioner's "affirmative defense" and characterized it as "the heart

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[3]Petitioner's counsel variously explained his failure to produce the letter on the grounds that he had obtained it only recently (Tr. 479), that the government had not fully complied with his discovery requests (*ibid.*), and that the letter was protected by the attorney-client privilege (Tr. 629).

of our defense" (Tr. 482). The defense plainly intended to introduce the letter as evidence in chief at trial and cannot avoid the requirements of Rule 16(b)(1)(A) merely because it first sought to use the letter during cross-examination of a government witness (*i.e.*, Agent Seidemann).

Likewise, petitioner's argument that the district court imposed an inappropriate sanction is insubstantial. Under Rule 16(d)(2), a district court may remedy a violation of the Rule's discovery provisions by entering any order "it deems just under the circumstances." Here, petitioner's counsel explicitly agreed with the court's determination that he had deliberately violated Rule 16(b)(1)(A) (Tr. 802). Counsel stated that he had made a deliberate decision not to turn over the letter (Tr. 811-812, 814). In these circumstances, the district court was justified in finding that petitioner had deliberately thwarted the government's opportunity to investigate the genuineness of the letter and for that reason should be precluded from arguing to the jury that the letter's authenticity could be inferred from the government's failure to adduce contrary evidence. Defense counsel was permitted to respond to the government's contention that the document was a fraud and to argue fully the significance of the letter. Thus, despite her insistence that she was wrongly prejudiced (Pet. 57-64), petitioner suffered no overburdening sanctions for her counsel's violation of Rule 16; indeed, the district court's resolution of the problem was generous to her under the circumstances. The record is clear, as the court of appeals held (Pet. App. 3a), that the sanction imposed was modest considering counsel's deliberate flouting of the discovery rule.[4]

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[4]Petitioner's allegations (Pet. 38-44, 66-67) of judicial misconduct have no basis in the record, and the court of appeals found it unnecessary even to comment on them. In view of counsel's deliberate refusal to comply with Rule 16, his inconsistent, if not mendacious, explanations for his failure in that regard, and his generally obstreperous conduct at trial, it is little wonder that the trial judge may at times have grown

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

ROBERT E. LINDSAY
THOMAS M. PRESTON
Attorneys

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exasperated with the behavior of petitioner's attorney. A review of the transcript shows that the judge repeatedly displayed remarkable patience in considering and reconsidering the arguments advanced by defense counsel. Indeed, although petitioner has levelled many accusations, she has failed to provide a single record citation to an alleged instance of judicial misconduct.

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